Publications Committee


# BULLETIN

OF THE

# UNIVERSITY OF TEXAS

1916: No. 12

FEBRUARY 25 1916


# JUDICIAL REFORM IN TEXAS


Published by the University six times a month and entered as second-class matter at the postoffice at
AUSTIN, TEXAS

# Publications of the University of Texas



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**The benefits of education and of useful knowledge, generally diffused through a community, are essential to the preservation of a free government.**

**Sam Houston.**

**Cultivated mind is the guardian genius of democracy. . . . It is the only dictator that freemen acknowledge and the only security that freemen desire.**

**Mirabeau B. Lamar.**

# FOREWORD

The subject of judicial reform has probably received more attention in the press of the country in recent years than any other subject connected with the administration of public affairs. Some of the criticisms leveled against the courts are extravagant, others are captious, and still others are founded on a failure of the public to appreciate the inherent difficulties of administering justice swiftly and accurately under the very complicated industrial and commercial relationships existing in our modern business world. After all allowances are made, however, the staunchest friend of the existing judicial system is forced to acknowledge that very many of the criticisms are well founded, that our courts are needlessly slow and uncertain, that the cost of litigation is much higher than it should be, and that our criminal laws are nowhere strictly enforced and in many places are almost a dead letter.

This bulletin is not offered as a complete solution of this difficult problem. It is believed, however, that the addresses it contains will provoke thought and will contribute something to the discussion that is going on, and, by so doing, will hasten the day when a more rational system will be evolved.

The addresses here presented were delivered at the annual meeting of the University of Texas Law Association at its meeting held in Austin, during the Thanksgiving reunion, 1915. The first paper, that by Mr. Kimbrough, discusses one great branch of the subject, the reorganization of the judiciary. That by Mr. Baker considers another branch of the subject, the procedural reforms that may be secured without any constitutional change or the reorganization of the courts.

Professor Butte's paper presents certain aspects of the German system of courts and judicial procedure, which, if adopted in this country, might greatly increase the efficiency of our system. His paper is in fact a translation of the German Judiciary Act, somewhat abridged, which is now for the first time made available in English.

Lastly, there is presented a brief summary of a proposed constitutional amendment intended to reorganize our system

of courts, which was made the basis of an informal address by Chief Justice Key, of the Third Court of Civil Appeals.

Neither the Law Association as a body nor the University of Texas assumes responsibility for the sentiments expressed, which are merely the individual opinions of the writers of the papers.

An excellent address on Legal Ethics was delivered by Chief Justice Nelson Phillips of the Supreme Court of Texas, but as it did not bear on the subject of this bulletin it is not reproduced here.

Copies of this bulletin may be had by addressing Mr. Wilson Williams, University of Texas, Austin, Texas.

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# REFORMS IN THE TEXAS JUDICIARY

W. H. Kimbrough, of Amarillo

Mr. President:

It is a matter of extreme delicacy in an unpretentious practioner to undertake a discussion of the evils existing in the administration of the laws of the State through the courts, and I trust that you will believe that what I shall say will be said with great diffidence as well as in perfect candor and with good will towards every one.

I am purposely avoiding the term "judicial reform" because it has been brought into disrepute by the muck-raking magazine and newspaper writers and political agitators, who have merely beclouded the subject by approaching it from a non-professional or unprofessional viewpoint and by the injection of extraneous issues.

However, we shall not be wise to ignore altogether the popular agitation upon this subject which the country has witnessed during the last decade. There is a warning in it which we well may heed. The last presidential election ended with a great, forceful man in second place, who stood publicly and stubbornly committed to judicial recall, including not only the recall of judges but also the recall of judicial decisions that might displease popular sentiment. We should not close our eyes to the fact that there is a widespread discontent with existing judiciary conditions and the current output of the courts. There is no denying the fact that there has been an alarming decadence in the judiciary of this country, in the quality of its work, in the dignity of its attitude, and in the respect and confidence of the public.

But the "judicial reformers" have made a fundamental error in supposing that the remedy for existing ills is to be sought in revising the forms and methods of procedure. The evil lies deeper. It cannot be reached by superficial correctives. It is in the courts themselves, and chiefly in the judges composing the courts. A great court will not permit forms and rules of procedure to affect in any great measure the quality of its work, but will brush aside mere irregularities

and vindicate the rights of litigants. It will not spend its time in quibbling over the slips of counsel in details of practice, but will dig up, expound, and apply the principles of law and justice and make a dispositon of the cause that reaches the ends of substantial justice. The court that does so, will in every age and country receive the grateful and loyal support of bar and people.

### GREAT JUDGES THE NEED OF THE HOUR

The cry of the world has ever been for men. There is no substitute for them. No form of government however excellent, no institution however benevolent in plan or purpose is worth anything unless administered by men of fit type and mold. But the efficient man has force and initiative to break through the shell of forms and circumstance to a great world service even as the insect breaks through the shell of the chrysalis to a higher and brighter life. So in the world's judicial history, the heart of a great judicial system is revealed in the great court, and the heart of the great court in the great judge.

Give us judges throughout the land like Marshall and Story and Kent and Taney; give us judges in Texas like Hemphill and Roberts and Stayton; and the outcry against the judiciary will soon spend itself and be silenced. Any system of judiciary changes that does not take for the pole star of its purpose the placing of great judges upon every bench is doomed to certain failure. The whole problem is a problem of judges.

The problem before us in Texas is to revise our constitutional and statutory provisions so as to call into the service of the judiciary the highest possible type of judges, surround them with conditions wholly favorable to the highest character of work, remove from them every motive and influence that even tends to detract from the quality of their output or to the lowering of their standards, bring unity into our court decisions, speed the disposition of causes, and touch the lips of our judges with the fires of genius.

### AN ELEVEN-HEADED ANOMALY

Far from these ideals is the system now in force. It would

hardly be fair to call the present system a hydra-headed monster. But with the supreme court, the court of criminal appeals, and nine courts of civil appeals, all handing down published opinions, it is at least an eleven-headed anomaly. It may be said that the nine courts of civil appeals are not courts of last resort, but they are practically so. On all questions of fact their findings are final; on all questions of remedial law their rulings are final, barring certified questions which constitute a negligible head of jurisdiction. Their jurisdiction is made final in several specified classes of cases. In other cases the supreme court grants so few writs of error on questions of substantive law, and it affirms so large a per cent of the cases in which it does grant the writ that the courts of civil appeals are, in all but name, courts of last resort.

The multiplication of appellate courts has produced a condition of complexity and confusion in the case law of the State that is exasperating and intolerable. It has also divided responsibility and produced a marked deterioration in the quality of the output of the courts while increasing its volume to a burdensome extent.

It may not be so easy to see how this is, but it is true. The courts of civil appeals labor under the perpetual temptation to strike off a question of difficulty without taking the time and putting forth the labor necessary to master it completely, consoling themselves with the reflection that if they go wrong, the supreme court exists for the purpose of correcting them. But when applications are made to the supreme court for writs of error, that court, especially in view of its crowded docket, labors under the constant temptation to refuse the writs without adequate consideration, consoling itself with the reflection that if there is error the courts of civil appeals are at least primarily responsible. This shifting of the sense of responsibility, which is the sole sanction of the courts' decisions, has an inevitable tendency to lower their standards, which is the last evil that can befall them. How far they have been able to overcome these deleterious tendencies is a question upon which every lawyer will have his own opinion, but a system that has this evil influence at the heart of it, cannot be a good system.

LOCAL AND POLITICAL INFLUENCES

The courts of civil appeals labor under additional disadvantages. They are but local courts elected by a local popular constituency. They sometimes know the litigants and know or hear too much about the parties and the causes before them which is not contained in the record. The judges of these courts sometimes owe their elevation to the activity of factions, partisans, and friends, who afterwards come before them as litigants. These courts, therefore, stand in little better position with reference to local influences, biases, and prejudices, than do the district courts.

The fact is, gentlemen, that under our system of choosing judges for short terms by popular election, judical positions, especially positions on the courts of civil appeals, and on the district court benches, have not infrequently been swept into the swirl of politics and made a part of the spoil system as ruthlessly as any political job. It is not to be doubted that as a rule the judges strive against these baleful influences, but they are ever present, and like the dripping water that finally wears away the stone, they have wrought a manifest deterioration in the quality of the work done by the courts.

Perhaps the Supreme Court, being further removed from local influences, being chosen by so large and so widely distributed constituency, is less subject to such evils than the courts which depend upon a more local support. But the Supreme Court has evils of its own, more serious than any of the other courts and, to the profession, is the most unsatisfactory court of the entire system. It suffered a loss of jurisdiction and influence when the Courts of Civil Appeals system was adopted in the early nineties. It suffered further hurt as a result of the passage of the Act of 1913, by which its jurisdiction was still further limited. Finally, the present rules governing applications for writs of error seem to operate to prevent litigants from getting to such residuum of authority as the court still possesses.

It is not meant to imply that the court does not aim to give each application for writ of error due consideration, but very many in the profession refuse to believe that the court has either the time or the strength to do so. Composed of only three

judges, struggling with a trial docket on which they are two or three years behind, and overwhelmed with a flood of fresh applications, the members of the court were more than human if they were not tempted to rush through their work hastily and to adopt expedients to prevent the piling up of new cases on the trial docket. How far the court succeeds in putting the temptation aside is not the question here. The point is that the tendency is an evil influence. It is not to be doubted that the court has the fullest sympathy of the profession as it struggles with a load that no three men can bear, but that does not reconcile members of the bar to what they believe to be a hasty or erroneous refusal of their applications, when they are sure the lower courts have committed error.

### QUALITY, NOT QUANTITY, THE TEST

A court cannot work under whip and spur. It is the quality, not the quantum of work a court turns out that counts. Judge Phillips made an unanswerable remark when he stated at the last meeting of the State Bar Association that the Supreme Court was endeavoring to make right decisions rather than dispose of many causes. The habit our appellate courts have of giving out newspaper statements at the end of each annual session showing the number of cases decided, the number of motions passed on, etc., cheapens them. It will bear repeating that quality, not quantity, is what is demanded in the output of the courts. In order that the quality may be worthy, there are two prime essentials, time for thorough investigation and deliberation, and qualified judges. Our Texas system tends to prevent both. The courts of civil appeals write long rambling opinions to fortify themselves against writs of error. They rush through cases at the rate of six to eight a week to make records against the swift returning day when they must stand for re-election. The Supreme Court struggles against a hopeless task. Thus we have oceans of output, but much of it is crude and sloppy.

What is the remedy? It must be radical and far-reaching. We must reconstruct for quality, for time for the courts without delay to litigants, and for building up high standards in the courts rather than dragging them down to time-saving political

expedients. The topmost crying need of every judicial system is great judges.

From the days of King Solomon till now, the qualifications of the judge have been the despair of human ideals. The judgeship involves a weight and delicacy of responsibility that demand of the judge an elevation and strength of character, a masterfulness of talent and industry, a fullness of learning, and a wealth of graceful and genteel accomplishments, that are seldom found united in one man. Such a man cannot be chosen by a chance throw into a miscellaneous crowd. He does not spring up in a day. He is a sort of century plant. He is one of a generation. But he is the *sine qua non* of any worthy judicial system. Any system which tends to drag the judge down to political expedients and cheap standards is unsound at heart.

### SUGGESTIONS FOR A JUDICIAL SYSTEM

This does not imply life tenure for the judges, nor does it exempt them from responsibility to the citizenship they serve. It does mean longer tenure, larger remuneration, and exemption from every tendency to lower standards, from divided responsibility, from local influences and from shrivelling motives of every kind. We may outline such a system thus:

1. We might well go back to the idea of the first days of the State and have one and only one appellate court for all causes, legal and equitable, civil and criminal. We have now thirty-three appellate judges composing eleven appellate courts. Cut them down to fifteen judges and bring them all into one court to sit twelve months in the year instead of nine as at present, with a month's vacation to each judge, and at one central place instead of nine as now. There is no other way to establish harmony and unity in our decisions. This would save the salaries of half the present appellate judges and permit an increase of salaries without additional cost to the State.

2. The judges of the appellate court should have a term of twelve years instead of six, and should not be re-eligible or eligible for any other office for at least two years after their retirement from this bench.

3. Six of the judges should be chosen by popular vote, one

at each biennial election; six of them by the Legislature, one at each regular session (members of the Legislature not to be eligible), and three of them including the chief justice should be appointed by the Governor, one every four years. The Governor should not have the power to fill vacancies except when he has the regular appointment; vacancies in the other positions to remain till filled by the Legislature or by popular election, as the case may be.

4. With a view to attracting to these judgeships superior legal talent, the judges should receive $7,500.00 to $10,000.00 a year.

5. Give the court a free hand in organizing its members and distributing the work among them.

6. Provide for appeals and writs of error from the district and county courts to the one appellate court, as was provided prior to the courts of civil appeals system. Give no court any discretion in respect to its own jurisdiction.

7. Relieve the court of the burden of delivering written opinions in its discretion where, in the court's opinion, no new question of law is involved.

8. Give the district judges a term of six years instead of four, and let them be appointed by the appellate court instead of being chosen by popular election. Make them ineligible for any but judicial office until two years after their retirement from the district judgeship. Increase their salaries to $4000 or $5000 a year. Give the appellate court power to remove the district judge for incompetency or other just cause.

# PROCEDURAL REFORM IN TEXAS

Rhodes S. Baker, of Dallas

## FAILURE OF OUR SYSTEM OF COURT PROCEDURE

It is not unusual for five years to be consumed in following an ordinary civil suit in its tedious routine from its filing in the trial court to its disposition in the State Supreme Court, even though it is never once postponed in any court, and even though it is affirmed in each successive step of its progress. If it happens to meet with reversal in the Supreme Court on the first appeal, but is luckily affirmed on the second appeal, it may easily take ten years. It is possible for a cause to go from the trial court to the court of civil appeals on successive appeals and to meet with successive reversals on purely procedural points without ever provoking any court to decide the substantive law governing it, and for this course to continue until the litigants have become so exhausted in mind and purse as to be indifferent to its outcome. It is possible for injustice beyond repair to be done because of some trifling blunder of the litigant in pleading or procedure, the court being disabled under the law to find a remedy. It is not uncommon for more time, strength and money to be spent by the lawyer in preparing and submitting his case, and the courts in hearing it, over the form of pleadings than over all the remainder of the case; nor is it uncommon for such a case on appeal to present more questions and difficulties in matters of form than in matters of substance. It is possible in a jury case for the litigant to lose in every forum, although every trier of the facts of his case may think that the greater weight of the testimony lies on his side of the issue, so sanguine is a jury that the judge and the appellate court will correct the jury's errors, and so deferential are the trial judges and the appellate courts to the jury's findings. It is possible for a minute, and obviously clerical mistake in attachment or other extraordinary proceedings to give rise to counter actions for substantial damages, although the courts and all the parties realize that but for the purely clerical mistake no right of action would exist.

It is possible for a perfectly meritorious cause to be either put in jeopardy or destroyed through the accidental combination of pleas of misjoinder and the running of the statutes of limitation, although the cause is pending in the proper court and all litigants have made ready to try it.

These absurdities and grievous wrongs are possible under the laws of Texas, although Texas has had reformed procedure since prior to 1846; has had merged law and equity courts since prior to that time; had struck down the common law rules which disqualify interested witnesses more than half a century ago; had abolished forms of actions and common law procedural technicalities in the very infancy of the Republic; had codified to a limited extent its procedural rules before England completed its own marvelous system relating to such matters and before New York, the home of David Dudley Field and the scene of his mighty labors for procedural reform, put its enactments upon its statute books.

Jeremy Bentham, the first and greatest of the mighty iconoclasts, who broke up the ancient absurdities and iniquities of the English law of the eighteenth century, speaks of it as "a fathomless and boundless chaos made up of fiction, tautology, technicality and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximizes delay and denial of justice." It would, of course, be extravagant so to describe the Texas system; but the incomplete catalog of instances set out in the opening paragraph of this paper is an all-sufficient indictment of the procedural branch of the Texas adjective law.

The situation is one which any lawyer, who, while a lawyer is also a citizen, and especially any such who has obtained his legal education at the University of Texas, and has thus been educated at public expense, as it were, views and should view with keen dissatisfaction. It might be intemperate to say that our procedural system has utterly broken down, but it is not too much to say that it is a burden under which justice groans and which, more than anything else, stigmatizes the legal profession.

## PROCEDURAL REFORM IN ENGLAND

In vivid contrast to this picture is one drawn by Baron

Bowen, describing the fruits of the English reform measures as those evidences appeared as early as thirty years ago. I quote:

"In every cause, whatever its character, every possible relief can be given, with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes, upon oral evidence or upon affidavits, as is most convenient. Every amendment can be made at all times and all stages, in any record, pleading or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted, without fear of contradiction, that it is *not possible* in the year 1887 for an honest litigant in Her Majesty's supreme court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy to even diminish pari passu with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

The American lawyer should, moreover, bear in mind that this pleasing picture of the English system can be drawn, notwithstanding the fact that the burden and variety of litigation upon the English courts is heavier than it is in Texas, for here our Federal courts relieve our local courts of a great volume of general litigation and bankruptcy administration, while the English courts carry all that additional volume of controversy. Baron Bowen is not alone in his estimate of the excellencies of the English system. Many books could be compiled out of the thoughtful and favorable descriptions of the English system given by eminent alwyers and judges, both in America and in England.

Why these differences in results of reform measures in these two English-speaking jurisdictions? If it be possible to find the correct answer to this query, we shall have taken the most encouraging step in the direction of procedural progress which can be taken at this time. Without a diagnosis the doctor may use remedies which will injure his patient instead of helping him. Without a diagnosis the lawmaker may aggravate our troubles instead of relieving them.

In our search for the disease we discover that English and American conditions are, in many respects, strikingly similar. Both have a common law background; both have reform laws adopted substantially contemporaneously; through common

speech both had the benefit of the propaganda carried on by each in their respective bounds; both passed laws consolidating law and equity, simplifying their procedure, facilitating the reaching of issues; both have the traditional jury; both have substantially the same rules of evidence, and many other points in common.

The fundamental differences between the two sets of conditions, however, are not hard to find. In view of the obligation which rests upon me upon such an occasion as this, to be brief, I shall not attempt to prove my case. I will simply state it. Your thougthfulness, your reading, your experience will confirm my opinion or cause you to differ with me.

## "ERRORS"

1. The large word in every litigated case in Texas courts is "error", by which expression is meant, to paraphrase the shorter catechism, any want of conformity unto or transgression of technical perfection. Our courts of the present day are not largely responsible for this attitude. They inherited it from their judicial ancestors, much as we inherit a Roman nose or large ears from our natural ancestors. The fact remains, however, that in the trial court the principal solicitude of the trial judge is and must be to avoid the commission of an "error", while the lawyers exert all their astuteness in either laying pitfalls themselves for the judge or their adversaries, or in trying to keep out of those pitfalls laid for them. The motion for a new trial deals principally with "errors" and not largely with the essential justice of the cause. In the appellate courts "errors," and "errors" only, are up for review, and it is not possible to project into the cause at that stage any reflections as to the intrinsic justice of one's cause, provided there was any proof tending to support a contrary theory. The appellate courts will not weigh contentions one against the other to discover which is the righteous and which the unrighteous. They say, and under our system must say, that "the issue was one of fact; the lower court has decided it; there was some evidence to sustain the verdict; we will not review it". The scales of the blind goddess can be used where there is substance to be weighed in one pan only of the balances; where there

is material for both pans, the case must be decided by the consideration of "errors".

In the English courts this is not so largely or commonly true as in our courts. To a pronounced degree mere errors are minimized in the English courts and inquiries into the intrinsic justice of the cause are magnified.

COURT-MADE RULES, NOT STATUTES, NEEDED

2. Our procedural machinery is too rigid. It is largely statutory. The statutory part overrides, by force of its origin, the rules formulated by the courts. Statutory changes are hard to get, and their effect is uncertain even when they are secured, until the courts shall have interpreted them. When a statute introducing innovations proves unsatisfactory the common remedy is to repeal it. Slight defects are usually, and even substantial defects are frequently, tolerated in preference to undertaking the burden, the risk, and the uncertainties of legislative action. As a necessary consequence of the increase of legislation, the domain which may be occupied by flexible rules of the court is being constantly encroached upon, and in many important points of contact between the statutes and the rules, no one can discover in advance of judicial determination where the statutes stop encroaching upon and narrowing the rules.

In England a different system prevails. An eminent English judge admirably summarizes the English plan as presenting: "A complete body of rules, which possesses the merit of elasticity and which (subject to the veto of Parliament) is altered from time to time by the judges to meet the defects as they appear, governs the procedure of the supreme court and all its branches."

Mr. Thomas Leaming of the Philadelphia bar, in discussing the vigor and efficiency of the English courts, attributes their excellencies to the fact that they are organized and transact their business under "rules which are promulgated from time to time and are constantly being improved upon, having for their object the simplification of procedure, the rapid dispatch of business and the settling of all minor questions which may arise in a case before actual trial".

In my opinion, all of our statutes except such as, upon strict consideration, are found indispensable to a system of procedure, should be repealed, and in lieu thereof sufficient powers should be conferred upon the courts to enable them to control, through simple, elastic and appropriate rules, all matters of practice. Beyond all, the ideal should be held constantly in view that neither in the trial court nor on appeal should emphasis be put upon formal matters, but instead it should be put upon substance and the elementary right of the cause, so far as that right could be found out.

It is argued that such an attitude would lead to laxity in procedure. The answer is that it has not had that effect in the courts where that ideal is emphasized. The intelligent, informed, and competent lawyer, in his anxious solicitude to present his case with all clearness and effectiveness, will strive under any system to avoid slothfulness and obscurity. Another answer to the charge is, that it is better for laxity in matters of form to exist than for matters of substance to be lost sight of in the law suit.

COURT-MADE RULES FLEXIBLE

3. Texas has actually changed more than England has since each adopted reforms in procedure, but has made fewer changes since adopting its reforms. Under the English system new reforms, improvements and experiments are being constantly tried and held onto where anticipated improvement is vindicated through experience. Their system of procedure, based on court rules, permits this to be done. Here there has been little change since the adoption of our practice system in 1846. There has been, in fact, no radical change except in 1891, and the change then had more to do with the co-ordination of the jurisdiction of the courts than with matters of procedure. We ought to remember that "there is, and can be, no such thing as finality about the administration of the law. It changes, it must change, it ought to change, with the broadening wants and requirements of a growing country, and with the gradual illumination of the public conscience."

In this paper I have purposely kept off of suggestions of those specific changes in our procedure which, in my judgment,

should ge made. The whole body of procedural law really needs overhauling. I do not see much room for readjustment of our courts themselves. The personnel, the industry, the patriotism of our judges is amazing. In a day and generation when material rewards are so much emphasized, the body of our judiciary has geen on the average far above what we have the right to expect, in view of the burdens we place upon our judges and the inadequate compensation we pay to them. Now, as in the past, they are set upon quite as high a plane as that of the better members of the profession. The correlation of the courts is not substantially defective. I think plans can and should be worked out for equalizing burdens in the trial courts by some flexible system of transfer of trial judges from one district to another at time of need. The needed improvements in all these matters can be worked out, however, in connection with procedural changes.

Procedural changes should not be obtained through constitutional provisions. The fact that New York had attempted to embalm its procedural system in its constitution kept back for many years reforms for which there was crying need there. They cannot be obtained through legislative revision for the reasons which I have stated, and for other reasons which might be stated. They can be obtained through legislative action only, which shall clear the boards and leave to the courts all details of pleading, practice and procedure. Surely the courts, more than any other part of our governmental machinery, are best fitted to deal with such details.

### A COMMISSION ON PROCEDURAL REFORM

My specific and concluding thought is that Governor Ferguson should be requested by this meeting to designate and co-operate to that end with a commission of not less than five earnest and capable lawyers whose faces are set toward procedural reform, to act in conjunction with the members of the Supreme Court, without pay, in formulating the legislative changes necessary to carry out the foregoing ideas, together with a system of rules covering the whole domain of procedure which, when officially promulgated by the Supreme Court, would be put into effect when legislative authority should be

obtained. The Legislature alone cannot do the job. The Governor, the Legislature and the courts co-operating can do it, and do it well.

It is my belief that the expense and uncertainty of litigation could, through such a program, be reduced enormously. I hesitate to say, and yet almost I dare to say that within five years the reduction would be one-half.

# THE ORGANIZATION OF THE GERMAN JUDICIARY

George C. Butte, Associate Professor of Law in the University of Texas

The truth of Jhering's thesis that law is not wholly, nor even mainly, a national product has been recognized by an ever growing number of American jurists and scholars. If we have been provincial in our conception of law, this is due to ignorance and conceit—serious obstacles, no one will deny, to all progress. They may be overcome. The first step is an honest desire to learn. Science is international. Nations in our age have encouraged the international exchange of knowledge and experience. In the solution of their internal problems, more especially their social and political problems, all wise nations consult the systems and the experience of other nations. It is strange that in the domain of law this source of light has been least availed of. The study of comparative law, though yielding the richest of fruits, has until recently been quite neglected in our country.

As a slight contribution to the study of the reorganization of the courts of Texas, we submit a translation of the German Judiciary Act, which, though abridged for want of space, will present some aspects of a system quite different from our own. It would be profitable, it is believed, to study other systems, notably the French, Swiss, and Italian, by the same method. The German judicial system has been chosen for presentation because of its acknowledged excellence. It may not be amiss to recall Sheldon Amos' tribute (Science of Jurisprudence, p. 505): "The prospects of the science of jurisprudence. . . . will depend largely upon a greater familiarity than has hitherto been encouraged in legal education with the vast and invaluable juridical literature of Germany. . . . Modern jurisprudence is emphatically a German creation."

It should be understood that this paper is offered merely to suggest ideas and provoke discussion and without any recommendation that the whole or any specific feature of the German plan should be adopted in Texas. If our judiciary is to be reorganized on a stable basis, all its parts must harmonize to

construct a perfect whole. New ideas must not be promiscuously borrowed and loosely thrown together in the new law. Every change must be carefully weighed. The parts must fit together and the whole must be suited to our institutions and our local conditions and local needs. Above all, adequate provision must be made for an easy transition from the old to the new system.

## THE GERMAN JUDICIARY ACT

### TITLE ONE

### *The Judicial Office*

1. The judicial power is exercised by independent courts which are subject only to the law of the land.

2. Qualification for judicial office is obtained by absolving two examinations. The first examination must be preceded by three years' study of the law at a university. Of this three-year period of study, at least three semesters (half years) must be spent at a German university. Between the first and second examinations an interval of three years must intervene which is to be spent in service in the courts and the office of attorneys and a part may be spent in the state attorney's office.

The several states may provide that the periods of university study and preparatory service may be lengthened or that a part of the latter not exceeding one year may be spent in service for the administrative authorities.

3. Whoever has pased the first examination in any of the states may be admitted in every other state to the preparatory service and the second examination. The time spent in preparatory service in one state may be credited in every other state.

4. Every regular professor of law in any German university may be appointed to judicial office.

5. Whoever has qualified for judicial office in one state, except as herein provided, may be appointed to any judicial office in the German Empire.

6. Judges are appointed for life.

7. Judges shall receive a fixed salary for their services.

8. Except by their consent judges may be removed from office, permanently or temporarily, or transferred to another court, or retired, only by virtue of a judicial decision and only for such reasons and under such forms as the law provides.

Temporary official inactivity which may arise under the law is not affected by this provision.

In case of a change in the organization of the courts or their districts, transfers may be ordered by the Department of Justice to another court, or removal from office with full pay.

9. Pecuniary claims of judges connected with their services, especially salary and pensions, may always be enforced by suit.

10. State laws conferring authority for the temporary exercise of incidental judicial power (by assessor and referendars) shall remain unaffected.

11. Paragraphs 2 to 9 shall not apply to commercial judges, lay judges and jurors.

## TITLE TWO

### *Jurisdiction*

12. The regular contentious jurisdiction is exercised by county courts, district courts, supreme courts, and the imperial supreme court.

13. The regular courts have jurisdiction of all civil suits and criminal cases which are not committed to the jurisdiction of administrative officials or administrative courts or to special courts designated or permitted by imperial law.

14. The following special courts are permitted:

1. The Rhine Navigation courts and the Elba Tariff courts, conformably with treaties.
2. Courts which are charged with the decisions of civil suits between landlords and rural tenants growing out of their rental contracts. (Abridged.)
3. Justice courts (gemeindegerichte), where the matter in dispute does not exceed in value the sum of sixty marks, provided, however, that the parties are allowed the right of appeal to the county courts, and provided further, that the jurisdiction of such justice courts extends only to persons who have their residence or place of business in the precinct (gemeinde).
4. Trade courts.

15. All courts are state courts (i. e., public organs).

The exercise of ecclesiastical jurisdiction in temporal affairs is without civil effect. This is especially true in cases affecting marriages and engagements.

16. Exceptional courts are forbidden. No man may withdraw himself from subjection to his legal judge. Statutory provisions relating to war courts and courts-martial are not affected by this provision.

17. The courts decide for themselves questions as to their competency and jurisdiction.

The state legislature, however, may submit to special tribunals controversies between the regular courts and the administrative authorities or administrative courts concerning questions of jurisdiction, subject to the following provisions:

1. The judges of such tribunals shall be appointed for life or in the event that they already occupy an office, then for the term of such office. They may be removed from office

under the same conditions as members of the imperial supreme court.

2. At least half of the members must belong to the imperial supreme court or a state supreme court. The number of members must be uneven and at least five and to arrive at a decision there must be the number of votes cast as specified by law.
3. The procedure in these tribunals is to be fixed by law. Their decisions are rendered in open session after summons to the parties.
4. If a regular court has assumed jurisdiction and rendered a final judgment before a motion was made to transfer the controversy as to jurisdiction to such special tribunal, the decision of the court is final.

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TITLE THREE

*County Courts (Amtsgerichte)*

22. The county courts are presided over by individual judges.

If several judges sit in the same county (as for example, in Berlin), the state department of justice will designate one of the same to supervise the business. Should the number of judges exceed fifteen such supervision may be divided among several of them. Each county judge disposes of the business intrusted to him, as individual judge.

23. The jurisdiction of the county courts except where the matter in controversy, regardless of its value, has been referred to the district courts, extends to the following controversies:

1. Suits involving pecuniary claims where the matter in controversy does not exceed 600 marks.
2. Suits without regard to the value of the matter in controversy between landlord and tenant or sub-tenant affecting dwellings or other rooms or between the tenant or sub-tenant of such rooms involving the possession, the use or the surrender of the same as well as controversies involving the detention of things brought into the said rooms or dwellings by the renter or sub-renter; controversies between masters and household servants; between employers and employees growing out of their relation of employment when such controversies arise during the existence of the employment relation; controversies between travelers on the one hand and innkeepers, teamsters, boatmen, ferrymen or emigration agencies in the ports of embarkation, affecting hotel bills, transport or ferry expenses on the carriage of such travelers and their goods and the loss or damage of the latter; likewise controversies between travelers and artisans arising in the course of the journey; controversies concerning defects in animals; controversies concerning

injuries to wild game; claims arising out of illicit sexual intercourse; proceedings instituted to bar legal claims by giving public notice.

24. In other matters the jurisdiction and duties of the county courts are prescribed by other sections of this law (26, 30, 39-57, 85-89, 158), and the code of civil procedure.

## Title Four

### *Lay Courts*

25. Lay courts shall be held in the county courts for the hearing and decision of criminal cases.

26. Lay courts are composed of the county judge, as presiding officer, and two lay judges.

27. The lay courts have jurisdiction of the following:

1. All petty offences.
2. All those misdemeanors punishable with imprisonment not exceeding three months or a fine not exceeding 600 marks, separately or both coupled with confiscation, except, however, the misdemeanors designated in paragraph 20 of the Criminal Code and paragraph 74 of this act.
3. Criminal libels may be prosecuted only when complaint is filed by the injured party.
4. For the misdemeanor of theft under paragraph 242 of the Criminal Code where the value of the stolen object is not in excess of 150 marks.
5. The misdemeanor of embezzlement under the paragraph 246 of the Criminal Code where the value of the thing embezzled does not exceed 150 marks; the misdemeanor of swindling under paragraph 263 of the Criminal Code where the damage does not exceed 150 marks.
7. Misdemeanor of property damage under paragraph 303 of the Criminal Code where the damage does not exceed 150 marks.
8. The misdemeanor of aiding and abetting and the misdemeanor of concealment under paragraphs 258-9 of the Criminal Code when the principal offence would fall within the jurisdiction of the lay courts.

28. When the jurisdiction of the lay courts is conditioned upon the value of the thing or the amount of damage and it appears at the trial that the said value or damage is more than 150 marks, the court shall not dismiss the case for want of jurisdiction unless there are other grounds therefor.

29. The lay courts have jurisdiction over those criminal cases which may be referred to them under the fifth title of this act (No. 75) by the district courts.

30. Except as otherwise provided by law the lay judges at a trial of

the cause are possessed with full judicial power and have the same voting power as the county judge and participate likewise in the decisions of all the incidental questions that may arise, including those which have no direct relation to the judgment and those which may be decided without provision of oral hearing.

Questions outside of the trial are decided by the county judge.

31. The office of a lay judge is a public office. It may be filled only by a German citizen.

32. The following are incompetent to serve as lay judges:

1. Persons who have lost their civil rights as a result of a criminal conviction.
2. Persons against whom a case is pending for a crime or misdemeanor that may result upon final judgment in their loss of civil rights or their qualification for public office.
3. Persons who by judicial decree are restricted in the disposition of their property.

33. The following persons shall not be summoned to act as lay judges:

1. Persons who have not completed their 30th year at the time the list is made up.
2. Persons who at the time the list is made up have not resided in the precinct for two full years.
3. Persons who have received for themselves or their families public poor support at any time during the three years preceding the making up of the list.
4. Persons incapable for the office on account of mental or physical weakness.
5. Household servants.

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36. The president of every precinct or similar district shall make up annually a list of persons residing in the precinct who can be summoned as lay judges. This list shall be open to public inspection in the precinct for a week, notice of which shall be given publicly.

37. Any person may within said week in writing question the correctness or the completeness of such lay judge list.

38. The precinct president shall send the list together with such objections and his comments thereon to the county judge of that district. Should further corrections be necessary after the sending of the list the precinct president will notify the county judge.

39. The county judge combines the various lay judge lists sent to him and prepares the forms of decision upon the objections filed.

The special committee (County Jury Commissioners) meets annually in the county court. This committee is composed of the county judge as president and an administrative official appointed by the state and seven reputable citizens as counselors. These citizens are chosen from the inhabitants of the county.

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41. This committee decides upon objections made to the lay judge list. Their decisions are to be recorded. No appeal is allowed.

42. The committee selects from the final list for the next year first, the requisite number of lay judges, and second, the requisite number of alternate lay judges. The latter are to be selected from those persons who live at the county seat or in its immediate neighborhood. (This same committee selects the jurors. See paragraph 87.)

43. The number of lay judges and alternates to be chosen for each county court is determined by the department of justice of the state with the end in view that each lay judge shall not be required to serve for more than five days of regular session.

44. The names of the lay judges and alternates thus selected shall be published in the special notice called the annual list.

45. The days for regular sittings of the lay courts shall be fixed in advance for the whole year. The order in which the lay judges shall serve is determined by drawing in open court, the county judge doing the drawing. A record is made of the proceedings by the clerk of the court.

46. The county judge thereupon notifies the lay judges of their selection and of the court days at which they are called to serve, warning them of the penalties for failure to appear. The alternate for lay judges summoned in the course of the year shall be notified in like manner.

47. Any change in the order of service of the lay judges may, on their motion, be allowed by the county judge, provided that there are no cases already set for the session at which they are to serve. The motion and the action thereon are made of record.

48. Should the business of the court require extraordinary sessions, the extra lay judges therefor are selected from the list of alternates in conformity with paragraph 45. Should some emergency make this impossible, the county judge may draw alternate lay judges only from the list of those residing at the seat of the court. The circumstance making this necessary are to be stated in the record.

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50. If the length of a session extends beyond the time for which a lay judge is called to serve, he must nevertheless continue his service to the end of such session.

51. An oath is administered to the lay judges in open session at their first appearance. It is valid for the entire year. A record is made of the administration of the oath.

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53. Exemptions will be considered only when claimed within one week after the lay judge concerned has been notified of his selection. Should the grounds for the excuse arise or become known for the first time at a later date, then the period of one week is to be reckoned from such later date. The county judge decides upon the application after hearing the State Attorney and there is no appeal.

54. The county judge may, upon application, excuse a lay judge from attendance upon particular sessions for causes which prevent his attendance; but the same may be made conditional upon some other lay judge taking his place. The application and the action thereon are to be made and recorded.

55. The lay judges and jury commissioners are reimbursed for their traveling expenses.

56. Lay judges and jury commissioners who do not appear punctually at the session or otherwise fail in their duties without sufficient excuse are subject to a fine from 5 to 1000 marks as well as costs. The fine is assessed by the county judge after hearing the State Attorney's office. Should a sufficient excuse be later given, the fine may be partly or entirely remitted. Appeal is allowed in accordance with the Code of Criminal Procedure.

57. The department of justice of each state prescribes the latest day at which the original lay judge lists are to be made up and sent to the county judge, also when the committee (commissioners) are to be called and the selection of lay judges to be made.

## Title Five

### *District Courts*

58. The district courts are composed of a president and the requisite number of directors and associates. The associates may be county judges in the district in which the district court sits.

59. The district courts are divided into civil and criminal divisions.

60. In the district courts masters and commissioners may be appointed as needed. The appointments are made by the department of justice in each state for the period of one year.

61. The full court is presided over by the president, the divisions by the president and the directors. Before the beginning of the year the president names the division to which he will belong. Who shall be presiding officer of the remaining divisions is determined by the president and the directors by a majority vote and in case of a tie, the president decides.

62. Before the beginning of the year, the business of the court is divided for the year among the divisions of the same class and the regular members of the several divisions as well as the alternate members are designated. Every judge may be appointed a member of several divisions. The arrangements thus made can be changed in the course of the year only if the same becomes necessary by reason of overwork on any one division or by reason of change of conditions or disability of individual members of the court.

63. The arrangements prescribed in the foregoing paragraphs are made by the executive committee. This is composed of the president as chairman, the directors and the oldest member of the court in point

of service or point of age where the service is the same. Majority vote decides and in case of a tie, the president's vote is decisive.

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65. In case of disability of the regular chairman of a division the office is filled for the time being by that member of the division who is oldest in point of service or point of age where the service is the same.

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68. In each division the chairman distributes the work among the members.

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70. The civil divisions, including also the division for commercial cases, have jurisdiction of all civil suits which have not been delegated to the county courts.

The district courts have exclusive jurisdiction without reference to the value of the matter in dispute as follows:

1. Claims founded upon the law of June 1, 1870, concerning raft taxes, also claims against the imperial treasury (fiscus) arising out of the act of March 31, 1873.
2. The claims against public officials for exceeding their lawful authority or omitting to perform their lawful duty.

71. The civil divisions, including the divisions for commercial cases, are appellate courts for all appealable suits tried by the county courts.

72. The criminal divisions have jurisdiction to conduct such preliminary trials as by the C. C. P. are intrusted to this court. They also decide appeals from decisions of commissioners and county judges as well as against the judgments of the lay courts. The criminal divisions further dispose of all business intrusted by the C. C. P. to the district courts.

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## Title Six

### *Jury Courts*

79. For the trial and decisions of criminal cases in the district court, jury courts shall be regularly convened.

80. Jury courts have jurisdiction over crimes which are not assigned to the criminal divisions or to the imperial supreme court.

81. The jury courts are composed of three judges, including the chairman, and twelve jurors who are called to decide the question of guilt.

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83. The chairman of the jury court is designated for each session by the president of the state supreme court.

He is selected from the members of the supreme court or from the district court of the same district. The vice-chairman and the other judges are named by the president of the district court and selected from the members of the district court.

84. The office of juror is a public office. The same can be filled only by a German citizen.

85. The original list from which the lay judges are selected shall serve also from which the jurors are selected. The provisions of paragraphs 32-35 concerning the selection of lay judges shall apply also to the selection of jurors.

86. The number of jurors to be selected for each jury court and the distribution of the number in the various counties is determined by the department of justice of the state.

87. The committee (No. 40) which assembles annually in the county court for the selection of lay judges shall likewise select those persons from the list which it recommends for service as jurors for the coming year. They shall recommend three times the number of jurors assigned to each county.

88. The names of persons proposed for jurors shall be published in the list (proposed list No. 89). This proposed list together with objections as to any individuals named therein is to be sent to the president of the district court. The president designates a session of the district court at which five members, including the president and the directors, take part. The court finally rules upon the objections and thereupon selects from the proposed list the requisite number of jurors and alternates for service in the jury court.

As alternate jurors such persons are to be selected as live at the seat of the jury court or in the immediate neighborhood.

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90. The names of the regular and alternate jurors are published in separate lists known as the annual list.

91. At least two weeks before the beginning of the term of the jury court and in an open session of the district court at which the president and two associates take part and in the presence of the State's Attorney thirty regular jurors are drawn. The lots are drawn by the president. Jurors who have performed their duty in an earlier term of the same year are held to service only if they request it.

The clerk of the court makes the record of the drawing.

92. The district court sends the list of the selected regular jurors to the chairman of the jury court.

93. These jurors are thereupon summoned by the chairman of the jury court to the opening session of the jury court under warning of the penalties for failure to appear.

Between the service of the summons and the opening day of the session wherever possible at least a week should intervene and never less than three days.

94. Applications of jurors to be excused for legal grounds are decided by the judges of the jury court after hearing the State's Attorney and if the jury court be not yet assembled then by the chairman of the jury court. There is no appeal. In the place of excused jurors the chairman shall order if it can be done another drawing of jurors from

the annual list and the issuance of summons to them. The clerk of the court shall make the record of such drawing.

95. If a term of the jury court extends beyond the year, the jurors serving at the same are nevertheless bound to continue in service to the end of the term.

96. The provisions of paragraphs 55-6 shall apply to jurors. The decisions referred to in No. 66 in relation to jurors shall be made by the judges of the jury court.

97. No person shall be designated as juror and lay judge in the same year. Should this, however, happen or should the same person be called to serve in several districts in the same year he shall accept that office to which he was first summoned.

98. The criminal division of the district court may order that special sessions of the jury court shall be held at other places than the seat of the district court in the district. In such case a special list of alternate jurymen will be made up by the district court for such sessions.

99. The department of justice of the state may order that a number of district court districts may be combined into one jury court district and the sessions of the jury court held in some one district court. In such a case the district court in which the sessions of the district court are to be held, and the president of the same shall perform the duties set forth in Nos. 92-98, as to the larger jury court district; and the members of the jury court, including the vice-chairman, are to be selected from the members of the various district courts embraced in the larger jury court districts.

## Title Seven

### *Divisions for Commercial Cases*

100. Where the department of justice of any state deems it necessary, divisions of the district court may be created for the trial of commercial cases whose jurisdiction shall extend co-extensively with the district court district or be limited to some definite local subdivision of such district.

Such divisions for commercial cases may have their seat within the district court district at places where the district court does not sit.

101. Commercial cases within the meaning of this law are those civil suits in which plaintiff's petition presents a claim:

1. Against a merchant within the meaning of the commercial code growing out of the transactions which are for both parties commercial transactions.
2. A claim growing out of a negotiable instrument within the meaning of the Negotiable Instrument Act or growing out of any of the documents designated in No. 363 of the CC.
3. Claims growing out of any of the following legal transac-

tions: (a) Out of transactions between members of a commercial organization (corporation, limited societies, etc.) or between such societies, its members or between a silent partner and the manager of the business arising during the existence or after the dissolution of the business. Likewise, claims arising out of transactions between the directors or liquidators of a commercial organization or between the organization and its members. (b) Out of transactions involving the right to use the firm name. (c) Out of transactions that relate to protection of trade marks, patterns and models.

4. Claims arising under the law of May 27, 1896, for the suppression of unfair competition.

102. The trial of such a suit takes place in the division for commercial cases if the plaintiff, in his petition, requests it. (Otherwise, case goes to the civil division.)

103. Should a case come to trial before the division for commercial cases that does not properly belong there, it shall, upon motion of defendant, be transferred to the civil division.

104. Should the case come to trial before the civil division and properly belonging to the division for commercial cases, the same may on motion by defendant, be transferred to the court for commercial cases. A defendant whose name does not even appear in the official register as a merchant, cannot base his motion on the ground that he is a merchant.

The civil division cannot of its own motion transfer a cause to the division for commercial cases, and it may deny the defendant's motion for transfer even though plaintiff has consented thereto.

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109. The division of the court for commercial cases is composed of at least one judge of a district court as chairman and two commercial judges, all of whom have equal votes. In controversies between ship charterers or navigators and the crew, the decision in the first instance may be made by the chairman alone.

110. As referred to in No. 100, a county judge may be the chairman of the division for comercial cases.

111. The office of commercial judge is a public office. (Without salary or reimbursement for expenses.)

112. Commercial judges are appointed for the period of three years upon the recommendation of the body representing the commercial community. (Chambers of commerce and the like.)

113. Any German citizen may be appointed commercial judge who has completed his 30th year and is or who has been officially recorded as a merchant, as a president of a corporation, as a manager of a limited society, or as a president of any other juristic person entered in the trade records. Only such person may be appointed commercial judge who lives in the district of the court for commercial cases or if

he is a duly registered merchant or has a business there. As to persons who qualify as a president of a corporation, a manager of a limited society or president of any other form of juristic person, it is sufficient if such society has its business in the district. Persons who by judicial decree are restricted in the disposition of their property cannot be appointed commercial judges.

114. In ports and harbors commercial judges may be selected from maritime circles.

115. Commercial judges before entering upon their offices, must take an oath of office.

116. During their term of office the commercial judges have all the rights and duties of regular judicial officers.

117. A commercial judge is to be removed from office if he subsequently loses the qualifications of his appointment. Such removal is ordered by the first civil senate of the appellate court after due hearing allowed.

118. As to matters for the decision of which commercial expert opinion is necessary and as to the existence of trade customs, the court for commercial cases may decide from its own knowledge and experience.

## Title Eight

### *Supreme Courts of the Several States*

119. The supreme court shall be composed of the president, a sufficient number of senate presidents and associates.

120. The supreme courts are to be divided into civil and criminal senates. (The number of which is determined by the department of justice of the state.)

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122. As associate judges only regularly appointed judges may be called.

123. The supreme courts have jurisdiction and the power of decision:

1. In appeals from the final judgments of the district courts in civil suits (where the district court has jurisdiction in the first instance).
2. For the review of judgments of the criminal divisions of the district court in causes appealed to them.
3. For the review of judgments of criminal divisions in the first instance where such review is founded exclusively upon a claim of the violation of a rule of law contained in a state statute.
4. The appeals against the interlocutory decisions of the district courts in civil suits.
5. Appeals against interlocutory decisions in criminal matters in courts of first instance except where the criminal divisions of the district court have appellate jurisdiction (see No. 72), and also against interlocutory decisions of

the criminal divisions in causes which they are trying on appeal.

124. The senates of the supreme court have the power of decision when composed of five members including the chairman.

## Title Nine

### *Imperial Supreme Court*

125. The seat of the Imperial Supreme Court shall be fixed by law. (It is at Leipzig.)

126. The Imperial Court is composed of a president and a sufficient number of senate presidents, and associates. (There are at present 11 senate presidents and 88 associates.)

127. The president, senate presidents and associates are appointed by the Emperor on the recommendation of the Bundesrat. Members of the Imperial Court must possess the qualifications of a judge in the state and must have completed their 35th year.

128. Should a member be finally convicted for a dishonorable act or condemned to imprisonment for longer than one year, he may be removed from office and declared to have forfeited his salary by a finding of the full session of the Imperial Court. Before such decree is made, such member and the Attorney General are to be heard.

129. If an action has been brought against a member for a crime or misdemeanor, he may in like manner be suspended from office.

130. Should a member on account of physical infirmity or on account of bodily or mental weakness become permanently incapacitated for the performance of his duties, he is retired and is to be paid a pension. Incapacity is not a condition precedent to a pension if any person retiring from service has completed his 65th year. The annual pension paid upon the completion of the tenth year of service is 20/60 of his salary. This increases with the completion of each following year of service by 1/60 more until the completion of 50 years of service.

In reckoning the period of service that time is included which the member spent in the service of the empire, or of any state, or within any state as attorney, advocate, notary, patrimonial judge or as professor of law in any German university.

131. Should no request for the retirement of a member of the court be made although the conditions for the same exist, it is incumbent on the president to order that such a request shall be made within a certain period. If this order is not obeyed, the retirement of such member shall be decreed by the full session of the court. Before such decree, the member affected and the state's attorney are to be heard.

132. The Imperial Court is divided into civil senates and criminal senates, the number of which is fixed by the Imperial Chancellor. (Now 7 civil senates and 5 criminal senates.)

133. The provisions of ¶61-68 shall apply provided that the executive committee (presiding) shall include the four oldest members of the court.

134. The employment of assistant or alternate judges is not allowed.

135. In civil causes the Imperial Court has jurisdiction to review the final judgments of the state supreme courts.

136. In criminal cases the Imperial Court has jurisdiction:

1. For the investigation and decision in first and last instance (i. e., original jurisdiction) in all cases of high treason directed against the Emperor or the imperial government.
2. For the hearing and decision of appeals (by way of "revision") from the judgments of the criminal divisions of the district courts acting as courts of first instance in cases where the state supreme courts can not be appealed to, and also from the judgments of the jury courts.

137. Should a civil senate desire to deviate from the holding of another civil senate or of the joint civil senates, or a criminal senate from the holding of another criminal senate or of the joint criminal senates, the legal question at issue shall be referred to the joint civil senates in the former case, or the joint criminal senates in the latter case, for final decision.

A decision of the entire court (plenum) must be obtained, when one civil senate desires to deviate from the decision of a criminal senate or of the joint criminal senates, or when one criminal senate desires to deviate from the decision of one civil senate or the joint civil senates.

The decision of a legal question in a case by the full court is binding upon all the separate senates. Such decision is made in every case without previous oral proceedings . . . . .

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139. A quorum for the decisions of the joint civil or criminal senates or of the full court shall be at least 2/3 of all the members including the presiding officer in each case. The number voting must be uneven. Should an even number be present, the judge last appointed shall not vote.

140. The senates of the Imperial Court have the power to arrive at decisions when seven (or more) members including the chairman are on the bench.

141. The order of business in the court shall be governed by rules which the court shall prepare and submit to the Bundesrat for approval.

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TITLE SIXTEEN

*Consultation and Voting*

194. To arrive at any decision (in any court) the number of judges prescribed by law must participate.

In trials likely to last a long time the presiding officer may order the attendance of substitute judges who shall be present at the trial and in case of the disability of any judge one shall take his place on the bench. Such provision shall likewise be made for substitute lay judges and *substitute jurors.*

(It is immaterial how such disability arises, whether permanent or temporary, the juror's fault or not. If in the course of a trial it becomes known that a juror is legally disqualified, a substitute juror takes his place—it is not necessary to discharge the jury and select a new one.)

195. During the consultation and voting only the judges trying the case may be present excepting, however, that the chairman may allow the presence of such persons as are attached to the court to perfect their legal training.

196. The chairman conducts the consultation, puts the questions and takes the votes. Differences of opinion among the judges are settled by the decision of the court (not to appear in the opinions).

197. No judge, lay judge or juror may refuse to vote on any question because he was in the minority on a previous question.

198. Decisions are arrived at by a majority vote except where otherwise provided by law. (Verdict of guilty 2/3 majority.)

Where the question at issue turns upon a sum or figure and there are more than two opinions, none of which has a majority vote, then the votes for the highest sum or figure are added to the votes for the next lower sum or figure and so on till a majority is obtained for some sum or figure.

If in a criminal case, apart from the question of guilty or not guilty, there are more than two opinions none of which has a majority vote, then the votes for a decision most unfavorable to the defendant are added to those next less in degree unfavorable to the defendant and so on till a majority is obtained for some result.

199. Votes are cast in the order of term of service, in lay courts and divisions for commercial causes in the order of age; the youngest voting first and the chairman last. If a secretary is appointed he votes first. The votes of jurors are taken in the order in which they were drawn as jurors. The foreman votes last.

200. Lay judges and jurors are bound to maintain secrecy as to what took place in the discussion and the voting. (Hence jurors cannot be called to testify as to these matters.)

## A PROPOSED CONSTITUTIONAL AMENDMENT

Chief Justice W. M. Key, of the Court of Appeals for the Third Supreme Judical District, delivered an informal address which was in the main a favorable comment upon the provisions of a joint resolution proposing an amendment to the State Constitution of Texas. This resolution, introduced in the Senate in 1913 by Senators Vaughan, Watson, Brelsford, and Morrow, and reported favorably by the Committee on Constitutional Amendments, provided for the abolition of all our existing courts and the substitution therefor of a system, the main outlines of which are here given with the hope that the scheme may prove suggestive and serve as a basis of discussion:

1. One supreme court to consist of not fewer than fifteen judges to be elected by the people of the State for overlapping terms of ten years. Each judge is required to go on circuit for one month during each year, and receives a salary of $6000 per year and $5 per day additional while on circuit, until otherwise provided by law. The six judges now composing the Supreme Court and the Court of Criminal Appeals, together with the chief justices of the nine courts of Civil Appeals are to be members of the Supreme Court until their present terms of office expire.

The Supreme Court so constituted is to be divided into two divisions, a civil division and a criminal division, the court itself designating the members to serve on each division. The quorum for the decision of cases in the civil division is to be five, and in the criminal division three.

2. The State is to be divided into not less than nine judicial districts, with not fewer than seven district judges in each district, to be elected for terms of eight years by the people of the district, each judge to receive a salary of $4000 per year and $3 per day additional while holding court outside of his home county, until otherwise provided by law. The terms of the district courts are abolished and the judges are required to hold court as often and as long as may be necessary to dispatch the business on hand. The judges may sit alone or in twos and

threes, and twice each year all the judges of the district meet and parcel out the work to be done.

The judges of the Courts of Civil Appeals, other than the chief justices, and the district judges now in office are to be district judges under the new system until the end of their present terms of office.

3. A probate court is created in each county to handle the probate business now handled by the county court, which ceases to exist. The probate judges in all the counties composing one of the judical districts are to be appointed by the district judges of the district, in meeting assembled, for a term of six years, the salary of each judge to be fixed by the county commissioners court of the county.

4. Each county may have as many "stipendiary magistrates" as may be decided to be necessary by the commissioners' court, to hold office for four years and receive such salary as the commissioners court may decide, their jurisdiction to extend throughout the county.

5. The affairs of each county are to be controlled by a county commissioners' court to be composed of four commissioners and one presiding commissioner, to be elected at large or by precincts as may be provided by law.